In the Supreme Court

OF THE

United States

OCTOBER TERM, 1968

No. 199

GEORGE B. HARRIS, Judge of the United States District Court for the Northern District of California,
Petitioner,

vs.

LOUIS S. NELSON, Warden, California State Prison at San Quentin,
Respondent.

On Writ of Certiorari to the Court of Appeals for the Ninth Circuit

PETITION FOR A REHEARING

THOMAS C. LYNCH,
Attorney General of the State of California,
ALBERT W. HARRIS, JR.,
Assistant Attorney General of the State of California,
DERALD E. GRANBERG,
Deputy Attorney General of the State of California,
CHARLES R. B. KIRK,
Deputy Attorney General of the State of California,
6000 State Building,
San Francisco, California 94102,
Telephone: 557-3944,
Attorneys for Respondent.

Topical Index

Table of Authorities Cited

United States Code and Statutes

Texts and Other Authorities

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. 199

GEORGE B. HARRIS, Judge of the United States District Court for the Northern District of California,
Petitioner,

vs.

LOUIS S. NELSON, Warden, California State Prison at San Quentin,
Respondent.

On Writ of Certiorari to the Court of Appeals for the Ninth Circuit

PETITION FOR A REHEARING

The respondent, Louis S. Nelson, respectfully petitions under Rule 58 for a rehearing by this Honorable Court of the above-entitled cause.

PRELIMINARY STATEMENT

Through this petition for rehearing, respondent respectfully urges this Court to reconsider its analysis of the authority to order discovery arising under the All Writs Statute, since the opinion herein was reached without consideration of legislative history clearly showing that Congress did not intend that statute to permit discovery.

Respondent also submits that discovery rules in habeas corpus should be uniform nationally, and that that result can only be achieved through rule-making or statute, not by the case by case process sanctioned by the opinion herein.

ARGUMENT

I

THE ALL WRITS STATUTE DOES NOT AUTHORIZE DISCOVERY IN HABEAS CORPUS BECAUSE CONGRESS SPECIFICALLY REJECTED DISCOVERY IN ENACTING THAT PROVISION.

In its opinion (p. 12), this Court found authorization for discovery orders in federal habeas corpus proceedings under the All Writs Statute, title 28, United States Code, section 1651(a). But reliance upon this statute is improper, for Congress specifically rejected discovery in enacting that provision.

The Judiciary Act of 1789 authorized United States courts to issue "all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."[1] Since its original

[1] Act of September 24, 1789, ch. 20, § 14, 1 Stat. 81, 81-82.

enactment, the All Writs Statute has been continuously in force without substantial change. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 272-73 (1942).[2] But neither the statutory writs[3] nor those previously sanctioned by this Court[4] could be utilized

---

[2]Compare Act of September 24, 1789, ch. 20, § 14, 1 Stat. 81; Act of June 22, 1874, tit. 13, ch. 12, § 716, 18(1) Stat. 135 (Rev. Stat. of 1873, § 716); Act of March 3, 1911, ch. 231, § 262, 36(1) Stat. 1162 (Judicial Code of 1911, § 262); Act of June 30, 1926, tit. 28, ch. 10, § 377, 44(1) Stat. 908 [28 U.S.C. § 377 (1926 ed.)]; 28 U.S.C. § 377 (1940 ed.); 28 U.S.C. § 1651(a) (1964 ed.).

[3]Statutory writs arising under the Judiciary Act of 1789 included mandamus, *scire facias*, writs of prohibition directed to district courts sitting in admiralty, and writs of error to state courts [Act of September 24, 1789, ch. 20, §§ 13-14, 25, 1 Stat. 80-82, 85]. The writ of subpoena *duces tecum* was suggested by section 15 [Act of September 24, 1789, ch. 20, § 15, 1 Stat. 82]. In 1793, writs of *ne exeat*, *fieri facias*, and injunction were added [Act of March 2, 1793, ch. 22, §§ 5, 8, 1 Stat. 334-35]. *Quo warranto* was added in 1870 [Act of May 31, 1870, ch. 64, § 14, 16 Stat. 143]. The Revised Statutes (§§ 688, 709, 716-17, 719, 724, 1786) included all of these except *fieri facias* [Act of June 22, 1874, tit. 13, chs. 11-12, 17, tit. 19, §§ 688, 709, 716-17, 719, 1786, 18(1) Stat. 127, 132, 135-37, 318]. Certiorari was added in 1891 [Act of March 3, 1891, ch. 517, § 6, 26 Stat. 828]. With the exception of *quo warranto* and subpoena *duces tecum*, the writs found in the Revised Statutes and subsequent enactments were carried over into the Judicial Code of 1911 (§§ 234, 237, 240-41, 261-62, 264) [Act of March 3, 1911, ch. 231, §§ 234, 237, 240-41, 261-62, 264, 36(1) Stat. 1156-57, 1162] and the 1926 edition of title 28, United States Code (§§ 342, 344, 347, 376-78) [Act of June 30, 1926, tit. 28, chs. 9-10, §§ 342, 344, 347, 376-78, 44(1) Stat. 906, 908]. The 1940 edition of title 28 included those found in the 1926 edition [28 U.S.C. §§ 342, 344, 347, 376, 377, 378 (1940 ed.)] plus *quo warranto* [28 U.S.C. § 377a (1940 ed.)]. None of these writs were vehicles for discovery.

[4]*E.g.*, *U.S. Alkali Ass'n v. United States*, 325 U.S. 196, 201-04 (1945) (certiorari, mandamus, and prohibition); *American Lithographic Co. v. Werckmeister*, 221 U.S. 603, 610 (1911) (subpoena *duces tecum*); *In re McKenzie*, 180 U.S. 536, 549-51 (1901) (supersedeas); *Craig v. Leitensdorfer*, 127 U.S. 764, 771 (1888) (attachment); *The Rio Grande*, 86 U.S. (19 Wall.) 178, 188 (1873) (certiorari to correct omissions); *United States Bank v. Halstead*, 23 U.S. (10 Wheat.) 51, 53-65 (1825) (execution); see *Howard v. Railway Co.*, 101 U.S. 837, 849 (1879) (assistance); *Adams v. Law*, 57 U.S. (16 How.) 144, 149 (1853) (*procedendo*). None of these would permit discovery.

for discovery.[5] Nor were any of the common law writs available for general discovery purposes.[6] Consequently, it is clear that those writs "agreeable to the principles and usages of law" did not permit discovery.

This Court has several times held that the All Writs Statute is not to be confined to writs existing in 1789 when the Judiciary Act was passed. *Price v. Johnston,* 334 U.S. 266, 282 (1948); *United States Bank v. Halstead,* 23 U.S. (10 Wheat.) 51, 55 (1825). The All Writs Statute has been termed—and was so characterized in the opinion herein (p. 12)—a "legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.'" *Price v. Johnston, supra,* quoting *Adams v. United States ex rel. McCann,* 317 U.S. 269, 273 (1942). But the

---

[5]Until the advent of the Federal Rules of Civil Procedure, there was no provision for discovery under federal law, with the exception of Equity Rule 58. 2A W. Barron & A. Holtzoff, Federal Practice and Procedure § 641 at 11 (Wright rev. 1961); see *Hickman v. Taylor,* 329 U.S. 495, 500-01 (1947). Accidental discovery was also possible under a statute permitting depositions *de bene esse,* a statute authorizing depositions under *dedimus potestatum* or *in perpetuum,* and Equity Rule 47 which allowed pre-trial depositions of witnesses in exceptional cases. Sunderland, *The New Federal Rules,* 45 W.Va.L.Q. 5, 19 (1938); quoted in 2A W. Barron & A. Holtzoff, Federal Practice and Procedure § 641, n.10 at 12 (Wright rev. 1961). The inapplicability of these provisions to habeas corpus was discussed in Respondent's Brief, Argument V, at pp. 62-68.

[6]The common law writs are catalogued in Corpus Juris. 71 C.J. *Writ* §§ 6-13, at 1628-33 (1935). Only two provided even limited discovery. 71 C.J. *Writ* § 13, n.56 at 1631-32 (1935) (writ of inquiry; writ *de ventre inspiciendo*). The writ of inquiry arose in default cases and was issued as a commission to the sheriff to ascertain the amount of damages. 17 C.J. *Damages* § 352 (1919); 1 W. Tidd, Practice 572-73 (4th Am. ed. 1856). The writ *de ventre inspiciendo* was issued "to search a Woman who saith she is with Child and thereby withholdeth lands from the next heir. . . ." 2 G. Jacob, Law Dictionary, *ventre inspiciendo* (1797); accord, 18 C.J. 1032, *de ventre inspiciendo* (1919). Obviously neither of these writs permitted general discovery in habeas corpus.

adoption of any procedure under the aegis of the All Writs Statute presupposes congressional approval. Yet as this Court noted in *United States v. Rosenblum Truck Lines,* 315 U.S. 50, 53 (1942), "The question here, as in any problem of statutory construction, is the intention of the enacting body." See also *United States v. Wise,* 370 U.S. 405, 412-14 (1962). And it is absolutely clear that Congress did not intend the All Writs Statute to authorize discovery.

The All Writs Statute was passed by the First Session of the First Congress as section 14 of the Judiciary Act of 1789.[7] Section 15, as enacted, governed the production of books and papers in the nature of a subpoena *duces tecum.*[8] But the original draft of section 15 included a provision for general discovery against defendants in actions at law in all courts of the United States. Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 Harv.L.Rev. 49, 95 (1923).[9] Its introduction in the

---

[7] Act of September 24, 1789, ch. 20, § 14, 1 Stat. 81.

[8] Act of September 24, 1789, ch. 20, § 15, 1 Stat. 82.

[9] This clause was as follows:

> "All the said Courts of the United States shall have power in the trial of actions at law on motion of a plaintiff, and due notice thereof as aforesaid, and his rendering it probable to the satisfaction of the Court that he has by casualty and without fault or negligence of his own been deprived of evidence necessary to support his acts, to require the defendant to disclose on oath his or her knowledge in the cause in cases and under circumstances where a respondent might be compelled to make such disclosure on oath by the aforesaid rules of chancery." Draft of Judiciary Act of 1789, § 15, as found in Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 Harv.L.Rev. 49, n.103 at 96 (1923).

This draft may be found in the Archives of the United States. Warren, *supra,* 37 Harv.L.Rev. at 49-50.

Senate on June 29, 1789, gave rise to a long and heated debate. *Id.* at 96-97. After Senators William Maclay and William Paterson had forcefully argued against it, Senator Paterson moved to strike the clause from the bill. W. Maclay, Journal 89-90 (1965 republication).[10] Senator Oliver Ellsworth, the section's author, rose in its defense, and before the Senate adjourned for the day he moved that the clause be amended to permit the defendant to also have discovery against the plaintiff. *Id.* at 90-91. The section was again considered on June 30, and Senator Ellsworth's amendment permitting mutual discovery was defeated. *Id.* at 91-92. Shortly thereafter the discovery clause was stricken from section 15. *Id.* at 92.

> "[The Judiciary Act of 1789] was a compromise measure, so framed as to secure the votes of those who, while willing to see the experiment of a Federal Constitution tried, were insistent that the Federal Courts should be given the minimum powers and jurisdiction." Warren, *supra*, 37 Harv.L.Rev. at 53.

See also 1 Annals of Cong. 854-56 (1789) (remarks of Representative Stone). The rejection of the discovery clause in the draft version of section 15 makes it patently clear that the Congress did not intend to give the power to order discovery to the federal judiciary under the Judiciary Act of 1789. That dis-

---

[10]The journal kept by Senator Maclay is the only extant record of the debates in the Senate which were, for the first few Congresses, held behind closed doors. Report of March, 1869, presented to the Committee on the Library by A. Spofford, the Librarian of Congress, as found in W. Maclay, Sketches of Debate iii (1880) (first printing of Maclay's journal).

covery was originally included in section 15, rather than section 14, and was stricken therefrom, also demonstrates that the Congress had no intention of authorizing discovery through the All Writs Statute.[11]

> "It is clear now that very important and, in some instances, vital changes were made from the Draft Bill before it became law. And it may well be contended that had the Judges of the Supreme Court been familiar with these changes and with the history of the progress of the Bill in Congress, several of the leading cases before that Court might have been decided differently." Warren, *supra,* 37 Harv.L.Rev. at 51.

This is one of those cases.

> "'[T]he courts created by statute must look to the statute as the warrant for their authority; certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it. . . .'" *Cary v. Curtis,* 44 U.S. (3 How.) 235, 244-45 (1845).

In view of the legislative history of sections 14 and 15 of the Judiciary Act of 1789, it is inconceivable that this Court could properly find Congressional authorization for discovery in federal habeas corpus under the All Writs Statute.

---

[11]It is worthy to note that subsequent discovery provisions have been approved by Congress before being implemented. See 28 U.S.C. §§ 2072-73 (1964 ed.).

II

DISCOVERY RULES AND PROCEDURES IN HABEAS CORPUS SHOULD BE NATIONALLY UNIFORM AND DEVELOPED THROUGH STATUTE RATHER THAN BY INDIVIDUAL COURTS.

In its opinion (pp. 12-13), this Court sanctions the development of discovery rules and procedures in habeas corpus by individual district courts, without providing any guidelines. It is obvious that the only result will be different rules and procedures in different circuits or districts. In rejecting the development of discovery rules by individual district courts in *Miner v. Atlass*, 363 U.S. 641, 649-50 (1960), this Court observed:

> "'[T]he matter is one which, though concededly 'procedural,' may be of as great importance to litigants as many a 'substantive' doctrine, and which *arises in a field of federal jurisdiction where nation-wide uniformity has traditionally always been highly esteemed.*
>
> "The problem then is one which particularly calls for exacting observance of the statutory procedures surrounding the rule-making powers of the Court . . . designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords." (Emphasis added.)

Certainly habeas corpus—even more than admiralty—is an area in which national uniformity "has traditionally always been highly esteemed." *Cf. Walker*

v. Johnston, 312 U.S. 275, 285 (1941). Such uniformity is made impossible by the decision herein, and can only be assured through rule-making or statute. To assure national uniformity, this Court should refer the problem to Congress rather than launching the district courts in a rudderless ship.[12] We agree, therefore, with Mr. Justice Harlan's dissent on this issue (pp. 3-5), and since the All Writs Statute does not authorize discovery, we respectfully submit that his persuasive analysis should be adopted and this Court should follow the principles set out in *Miner v. Atlass,* 363 U.S. 641, 649-52 (1960).

[12]In urging the orderly approach to the development of discovery rules permitted by rule-making or statute, respondent does not believe that any injustice would be worked against habeas petitioners. It is respondent's opinion that the flexible habeas corpus procedures under existing statutes can adequately develop the facts. As Mr. Justice Harlan points out (dissent, p. 2), petitioner herein already knew the officer's identity and could call him as a witness. If the existence of other material witnesses is developed at the hearing, the district judge can continue the matter until they can be called. Though this may be somewhat more cumbersome than pre-trial discovery, it nevertheless assures the full development of the facts, and demonstrates that no petitioner would be prejudiced by awaiting the orderly development of rules.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that a rehearing be granted in this case so that the Court may properly assess the power to order discovery under the All Writs Statute in the light of its legislative history and render a decision which will not foster the piecemeal and divergent development of discovery rules.

Dated, San Francisco, California,
April 14, 1969.

THOMAS C. LYNCH,
Attorney General of the State of California,
ALBERT W. HARRIS, JR.,
Assistant Attorney General of the State of California,
DERALD E. GRANBERG,
Deputy Attorney General of the State of California,
CHARLES R. B. KIRK,
Deputy Attorney General of the State of California,
Attorneys for Respondent.

CERTIFICATE OF COUNSEL

I hereby certify that I am counsel for respondent in the above-entitled cause and that in my judgment the foregoing petition for rehearing is well founded in point of law as well as fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
April 14, 1969.

CHARLES R. B. KIRK,
Counsel for Respondent.